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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 67.

UNITED STATES OF AMERICA,
Petitioner,

vs.

LOUIS BRUNO.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR RESPONDENT, BRUNO.

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October, 1946.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 67

UNITED STATES OF AMERICA, Petitioner, *vs.* LOUIS BRUNO.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

BRIEF FOR RESPONDENT, BRUNO.

Opinion Below.

The District Court did not file an opinion. The opinion of the Circuit Court of Appeals (R. 71-74) has been reported in 153 F. 2d 843.

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered on February 15, 1946 (R. 75). The petition for a writ of certiorari was filed on March 23, 1946, and was granted on May 13, 1946 (R. 76). The jurisdiction of this Court rests upon Section 240 (a) of the Judicial Code as amended by the Act of February 25, 1925.

Questions Presented.

1. Whether the Circuit Court of Appeals erred in reversing a conviction where there was no evidence to support the same.

2. Whether the invoicing of goods at a price higher than the ceiling, where the consignee is only to pay the ceiling price according to his inspection, is a wilful violation of the Emergency Price Control Act.

3. Whether a jury can find a seller of a commodity under price control guilty of a criminal violation where he wilfully sells at an over-ceiling price by falsely describing the commodity's grade, if the purchaser has a right to inspect shipments and reject any that are upgraded or by consent of the seller pay for them on the basis of their true grade.

4. Whether there was a custom in the trade for sellers to invoice goods at grades higher than those actually shipped.

5. Whether, if so, such a custom constitutes a defense when the custom itself is in violation of the Emergency Price Control Act.

6. Whether respondent repaid the amounts overcharged on all of the shipments covered by the information.

7. Whether, if so, such payment constitutes a defense.

Statute and Regulations Involved.

The statutes and regulations involved are the Emergency Price Control Act of 1942 and Maximum Price Regulation 30. The pertinent provisions thereof are set forth in the Appendix to the Government's brief, pp. 23-26.

Statement.

A criminal information was filed against respondent, Louis Bruno, for having sold waste paper at prices higher than the ceiling established by Maximum Price Regulation 30. Five separate sales of a carload each were the basis for as many counts in the information (R. 2-4.). The jury found respondent guilty of all five counts. He was sentenced to six months imprisonment and a fine of $500.00 (R. 1).

The judgment of conviction was reversed by the Circuit Court of Appeals for the Third Circuit (R. 75) to which court this court has issued a writ of certiorari. (R. 76).

James Carrano Sons Inc., received orders from Ohio Box Board Company and Taggart Corporation for waste paper and gave orders to T. Bruno Paper Stock Company for the same with instructions to ship the waste paper directly to the mills of the aforementioned companies. Carrano was a broker and carried on its business by obtaining orders from mills and then placing orders with dealers to ship directly to Carrano's customers. The dealers billed Carrano who paid them and Carrano in turn billed the mills for the paper shipped. Carrano gave respondent orders

for over eighteen carloads of various types of waste paper (R. 38, 39, 70).

Respondent invoiced the shipments which were the subject matter of the information as No. 1 assorted kraft paper and charged $1.75 per hundred weight the ceiling price therefor. Pursuant to Carrano's directions two of the carloads which are the subject matter of the information, were sent to Ohio Box Board Company, and three of them to the Taggart Corporation (R. 6-8).

Inspection at the mills of Ohio Box Board Company revealed the shipments referred to in the first count of the information contained 2,005 pounds of mixed paper, 25,979 pounds of corrugated, and 6,735 pounds of kraft (R. 18), and the shipment referred to in the second count of the information contained 24,040 pounds of corrugated and 485 pounds of kraft (R. 18).

Inspection at the mill of Taggart Company revealed the shipment referred to in the 4th count of the information contained corrugated paper which was a different type of paper than that referred to in the invoice (R. 21-22).

Insofar as the shipments referred to in counts 3 and 5 of the information are concerned, though the cars were inspected at the mill there was never any report of variation between the invoice and the actual contents of the cars (R. 28).

The orders from the mills to Carrano contained a provision to the effect that all materials were subject to mill inspection and approval and that if not as invoiced would be held subject to the shippers order and risk and at the shippers expense (R. 10).

The orders from Carrano to Bruno were upon the following condition: "The above merchandise is purchased subject to mill or consignees report as to weight, quality, excess freights etc."

In addition to the provisions of the orders it was a custom of the trade for the mills to pay for goods only in accordance with their inspection regardless of how they were invoiced (R. 10).

In regard to the cars mentioned in counts one and two, Ohio finding the contents different from the invoice paid Carrano in accordance with its findings on inspection.

In regard to the cars mentioned in counts three, four and five, Taggart finding the contents of the car referred to in the fourth count different from the invoice paid in accordance with its findings on inspection. There being nothing to show that the contents of the cars referred to in counts three and five of the information were different from the description in the invoice (R. 28) it paid Carrano in accordance with the invoice.

As between Carrano and Bruno it was their practice for Bruno to ship the goods to the mills and upon shipment to send an invoice to Carrano. Carrano would pay Bruno the invoice. Upon receiving the mill report he would communicate with Bruno, who would accept the mill report. When Carrano was paid by the mill less money than Bruno's invoice he would send Bruno a debit memo and then deduct the amount thereof from his next check to Bruno.

In the instances covered by the information, debit memos were issued covering the cars referred to in counts one, two and four (R. 68-69).

The price to be paid Bruno was to be the ceiling price of the goods received by the mills in accordance with their inspection.

When the transactions covered by the information were complete Bruno did not receive one cent above the ceiling price for the goods he shipped to Ohio and Taggart (R. 12 and 19).

In connection with the foregoing statement of facts it is important to bear in mind that Bruno never knew exactly what the cars actually contained. Bruno neither loaded the cars nor was he present when the cars were loaded (R. 42-45).

He would instruct employees of T. Bruno Paper Stock Company to fill the cars in accordance with the orders and with the further instructions that if they did not have sufficient paper of the quality called for to make a car to fill it with what ever was on hand (R. 42). This was done not only because the mills could use any kind of paper but also to comply with O. D. T. regulations. The cars would be filled in accordance with these instructions and he would receive a report of the total weight without any break down (R. 43). He would then invoice the car in accordance with the order knowing that it would be inspected at the mill and he would be paid the ceiling price based on the mills findings as to quality and quantity.

Only on two occasions was there a break down on the invoice and this was because of the fact that a specific load which had been weighed separately was included in the car (R. 51).

The jury convicted on all five counts (R. 1). The Circuit Court of Apepals overturned the jury's verdict and held that no criminal violation had been established (R. 74).

Summary of Argument.

I. There was no evidence to support the jury finding that respondent willfully made sales of waste paper at prices higher than the maximum prices permitted by Maximum Price Regulations 30.

II. The decision of the Circuit Court was a proper determination of the issue.

ARGUMENT.

The decision of the Circuit Court was correct because of the fact that there was no evidence to support the jury's verdict.

Each count of the information upon which the respondent was convicted alleges that respondent did wilfully and unlawfully demand and receive a sum in excess of the maximum price fixed by law for the commodities sold. In order that the conviction might stand the Government must have proven that respondent demanded and received these sums wilfully, that is, knowing that the amounts received were above the ceiling prices set by the Office of Price Administration.

We submit that the Government did not produce any evidence that the respondent demanded or received any

sum above the ceiling price for the merchandise sold and that there was no wilful violation of the law.

The evidence in the case showed that various mills ordered from J. Carrano & Sons various types of waste paper and agreed to pay J. Carrano & Sons, who were brokers, the ceiling price for the paper. These orders, however, contained a condition that all purchases were subject to mill inspection as to quality and quantity of paper received at the mill. Carrano then in turn sent out orders, to dealers, for the paper required by the mills. Among those that Carrano ordered paper from was the T. Bruno Paper Stock Co., of which company respondent, Louis Bruno, was the manager. (R. 38, 39).

The orders sent out by Carrano provided that he would pay the ceiling price for the paper but that all shipments were subject to mill inspection as to quality and quantity. (R. 10, 70).

The evidence further showed that it was a custom of the trade for dealers to ship paper to the mills on Carrano's order and to bill Carrano for the paper in accordance with the order regardless of the type of paper actually shipped. Carrano would then pay these invoices. The paper would be received at the mills, inspected by them, and upon their determining the quality and quantity of paper they would in turn pay Carrano the ceiling price for the same and Carrano upon receiving the mill report, if it varied from the invoice, would debit or credit the dealer on his next check the amount shown by the mill report to have been over or under paid originally. This procedure was followed in connection with all sales made by Bruno to Carrano.

Bruno after receiving the orders from Carano would instruct his employees to fill the cars with Kraft paper and ship them out. His further instructions to his employees were that if there was not sufficient Kraft paper on hand to fill a car they were to fill it with any other paper on hand and then ship it. O. D. T. regulations require that all space in cars be filled. Bruno was never present when the cars were loaded and had no actual knowledge of their contents but when the weights were reported to him he would invoice the goods as Kraft regardless of the actual contents of the cars, knowing that he would in the final analysis only be paid the ceiling price in accordance with the mills determination as to quality and quantity of the merchandise received.

Carrano testified that the entire procedure above outlined was a practice of the trade which had been followed and grown up over a course of years, and that in no instance did he pay Bruno anything above the ceiling price for merchandise which he purchased from him (R. 12).

In all of this Carrano was corroborated by the representatives of the mills who were called to the stand.

Nowhere in the testimony in this case can there be found any evidence to contradict the statements of the Government's witnesses to the effect that Bruno was not paid above the ceiling price for the merchandise which he shipped or that he had demanded or expected to receive any sum over the ceiling price.

It was the contention of the Government that because of the fact some of the debit memos were sent out after agents of the Office of Price Administration had inspected

some of the cars, and found that their contents was not the same as the invoice, that these circumstances were sufficient to justify the case going to the jury.

It further contends that the entries in the Bruno books together with respondent's explanation justified the case going to the jury.

These two situation might create certain suspicions in the mind of some people but they go no further than that.

A conviction cannot be sustained on suspicion or mere possibilities. Had the witnesses who had personal knowledge of all of the facts and circumstances not been placed on the witness stand, there might be some room for suspicion or surmise. However, the Government itself, in this instance, proved that nothing wrong was done.

A mere scintilla of evidence or suspicion is not enough to require the submission of an issue to the jury. The decisions establish a more reasonable rule, namely, that in every case before the evidence is left to the jury, there is a preliminary question for the Judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the onus of prof is imposed.

Gunning vs. *Cooley*, 281 U. S. 90, 50 S. Ct. 231, 74 L. Ed. 720.

It is the duty of the Government in any case to establish the guilt of the accused. It is the duty of the court to direct a verdict if no substantial proof of guilt is offered. When the proof rests on circumstances which lead as rationally

to the conclusion of innocence as of guilt, there is no proof of guilt and nothing to go to the jury.

Juries are not permitted in civil cases to speculate as to the negligence of a defendant. (*Atchison T. & S. Ry. Co.* vs. *Toops*, 281 U. S. 351, 50 S. Ct. 281, 74 L. Ed. 896). They should not be permitted to guess at the guilt of a defendant in a criminal case.

Leslie vs. *United States*, 43 F. 2d 288.

It was admitted by the respondent that the goods shipped were not in accordance with the invoice, however, it was his understanding, it was the custom of the trade, it was his agreement and it was one of the conditions of the orders that regardless of the contents of the cars payment would only be made at ceiling price in accordance with the findings of the mill.

In view of all of these things, the mere fact that agents found that three cars did not contain the merchandise called for by the invoice does not make that circumstance inconsistent with innocence.

It must be borne in mind that the mill had not inspected the cars when the agents arrived and that the inspection was made jointly by the agent and a representative of the mill. It certainly cannot be spelled out from the evidence produced that the mill would have made a different determination if the agents were not present.

To sustain a conviction on circumstantial evidence it must not only have been consistent with the defendant's guilt but it must have been inconsistent with his innocence. Such is not the case here.

Tingle vs. *United States*, 38 F. 2d. 573;
Langer vs. *United States*, 76 F. 2d 817;
Ribaste vs. *United States*, 44 F. 2d 21;
Gold vs. *United States*, 36 F. 2d 16.

The government further contends first that refunds were not made on two of the cars and secondly that refunds would not be a defense to a violation.

The evidence clearly shows that insofar as the cars involved in counts one, two and four are concerned, refunds were made by means of credit memos, (R. 68, 69), and the deduction of the amount thereof from subsequent checks sent by Carrano to Bruno in payment for other goods.

Insofar as the cars mentioned in counts three and five were concerned there was no refund made because the cars apparently contained the same merchandise as called for in the invoice.

The accounting office of Taggart never received any report that these cars contained goods different from the invoice (R. 28) and if they had an adjustment would have been made.

There were eighteen carloads of paper shipped by Bruno to Taggart. (R. 38, 39). The government showed its witness a group of freight reports covering shipments by Bruno to Taggart but these reports were never put in evidence (R. 59, 60, 61) and there was nothing to show that the reports shown the witness covered the cars in question.

There being nothing to show that the cars did not contain the goods called for in the invoice there would of course be no refund to be made and there was no violation.

Even if the contents of these two cars was different from the invoice and more was paid than Bruno should have received it would not make the transaction a violation of the law for it would have been, in view of the agreement between the parties and the trade custom nothing more than an error in bookkeeping or accounting and certainly not a wilful violation.

There is no argument against the government's other contention that where there has been a wilful sale above the ceiling a refund at a later time is no defense to the violation,

In order however to have this statement of law apply to the instant case one must first assume that there was a wilful violation.

In order to do this one must totally disregard the testimony not only of the defendant but of the government witnesses as well as the agreements between the parties, the custom of the trade, the provisions of the orders and all of the evidence.

The evidence in the case was clear and explicit that the sales were not to be completed transactions until such time as the mills had examined the merchandise and paid for it at the ceiling price according to the mills determination as to the quality and quantity of the merchandise.

This procedure might be in violation of some other regulation, though this is not conceded, it does not prove the charge contained in the various counts of the information.

The proof adduced at the trial clearly and conclusively showed that the respondent never expected to receive anything above the ceiling for the merchandise and that there was not a wilful violation of the law.

Conclusion.

For these reasons it is respectfully submitted that the judgment of the Court below should be affirmed.

GEORGE R. SOMMER,
Attorney of Respondent, Louis Bruno.

October 1946.

SUPREME COURT OF THE UNITED STATES

No. 67.—October Term, 1946.

The United States of America, Petitioner, v. Louis Bruno.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

[December 9, 1946.]

Mr. Justice Douglas delivered the opinion of the Court.

A criminal information was brought against Bruno for having wilfully sold[1] waste paper at prices higher than the ceilings established by Maximum Price Regulation 30.[2] The information contained five counts, each count charging a sale of a carload lot in 1944 at prices above the established ceilings. The jury found Bruno guilty on all five counts. He was sentenced to imprisonment for six months and fined $500. The judgment of conviction was reversed by the Circuit Court of Appeals. 153 F. 2d 843. The case is here on a petition for a writ of certiorari which we granted because of an asserted conflict in principle between the decision below and *United States* v. *Seidmon*, 154 F. 2d 228, in the Seventh Circuit Court of Appeals.

Bruno was in charge of a business, owned by a relative, which bought and sold waste paper. Carrano was a middleman who bought waste paper from Bruno on orders from Carrano's customers. The paper was shipped by Bruno direct to the customers, Carrano paying Bruno the price.

In each of the five sales challenged here Carrano ordered from Bruno a grade of paper known as No. 1 assorted kraft. In each Bruno invoiced the shipment as such and charged the ceiling price for that grade of waste paper. Carrano

[1] Section 205 (b), Emergency Price Control Act of 1942, 56 Stat. 23, 33, 50 U. S. C. App. Supp. III § 925 (b).

[2] See 7 Fed. Reg. 9732, 8 Fed. Reg. 13049, 17483.

paid Bruno the invoice price. It appears that the orders were subject to inspection and approval of the waste paper by the customers; that they customarily made the inspections on receipt of the shipments; and that if the paper was below the grade at which it had been invoiced, the customers would pay Carrano the lower ceiling price, Carrano debiting Bruno with the difference. Each of the five shipments in question was inspected by the customer on its arrival. It was discovered that each shipment was largely composed of corrugated paper, a grade carrying a lower ceiling price. In three cases the customers paid Carrano only for the quality of waste paper received. Carrano thereupon debited Bruno with the difference. In two cases the customer did not complain of the upgrading and Bruno retained the over-charges.[3] Moreover, the debits to Bruno in the three instances mentioned followed on the heels of an investigation by the Office of Price Administration. It also appears that the debits were not shown on Bruno's books. His ledger showed sales, not at the invoice price, but at lower prices. The concealed amounts were explained by Bruno as constituting his commissions on the sales.

The District Court charged the jury that "before you can find him guilty, there must have been in his mind an intention not to set a price and then have it adjusted afterwards according to the truth of the situation, but an intent to fix this price and charge it and get away with it—an intent to commit the crime, the formation of a purpose in his mind when he did this thing, to get more money for that paper than the ceiling price established by law."[4]

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[3] The Circuit Court of Appeals seemed to proceed on the assumption, that in no instance did the ultimate price which was paid exceed the ceiling price.

[4] The preceding part of the charge was:

"In order that there may be a crime here, there must have been an intent on the part of this defendant to commit that crime,

The court also charged that there could be no conviction if Bruno did not sell the waste paper "with the intent of receiving higher than ceiling price, and did not actually receive higher than ceiling price".

We think it was proper to submit the case to the jury. The evidence seems to us ample to support the conviction. There was false grading in each invoice. The sales were not made at a price to be determined on the customers' inspection of the grade. They were made at specific invoice prices which were above the ceiling. The goods were delivered at those prices; and those were the prices actually paid. In some instances there was a subsequent adjustment of the price to conform to the price ceiling for the grade actually shipped. But in others there was not. And bearing on the integrity of the system were two other facts—(1) the debits made followed the OPA investigation; (2) the inflated prices were not disclosed on Bruno's books. In a seller's market upgrading may be a convenient device for black market operations. As the Circuit Court of Appeals noted, when paper is scarce the seller

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which was to receive a price for the paper which he sold which was in excess of the ceiling price. Now, if actually there had been paid to him more than the ceiling price, but it was the intent and intention of all persons respecting it, not to accept that as the final price necessarily, but to accept it subject to adjustment which would be made upon the examination of the paper actually delivered and the establishment of the price set by law for that paper, that is, if they had the idea that the only price to be received was that which the law set for the paper actually delivered, and that actually was what was paid, then there was no intent on his part to break the law. But if he sold this paper to the dealer, the wholesale dealer for a price which was above the ceiling price, and that was the price that he intended to get, and if you find as a fact that the only reason he didn't get it was because he didn't get away with it and there was a discovery without his having intent to do the honest decent thing, and that was the only reason he didn't get it, still he would have had an intent to commit the crime and would have effectively committed it when he received above-ceiling price which he intended to receive, if he did so intend, and if the only reason that he didn't get the ceiling price was because he was found out."

may send not what is ordered but what he has, on the assumption that manufacturers will be glad to take any kind of paper they can get. In view of the inadequacy of the supply, buyers cannot always be expected to reject upgraded shipments or insist upon price adjustments. The facts of this case sustain that theory, for in two instances no price adjustment was sought or made. In view of all the circumstances, the jury could well conclude that the system adopted by Bruno was designed to bring him more for the goods than was lawful.

Reversed.